Nos. 14-556, 14-562, 14-571 and 14-574

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IN THE

Supreme Court of the United States

JAMES OBERGEFELL, *et al.*,
AND BRITTANI HENRY, *et al.*,

Petitioners,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICI CURIAE BRIEF FOR THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS AND ITS MICHIGAN, OHIO AND KENTUCKY CHAPTERS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The interest of *Amicus Curiae*[1] in this case is the protection of access to justice for same-sex couples who wish to marry or to have their marriages recognized, or who wish to adopt children, as well as the protection of the children of same-sex couples. This brief is submitted to highlight the impact of this Court's decision on Michigan, Kentucky, Ohio and Tennessee residents and their children.

The American Academy of Matrimonial Lawyers ("AAML") is a national organization of more than 1,600 family law attorneys throughout the United States. The Michigan Chapter of the AAML has 41 Fellows, the Ohio Chapter of the AAML has 47 Fellows, and the Kentucky Chapter of the AAML has 24 Fellows, all of whom concentrate their practice in family law and have met the requirements for admission to the AAML. Currently there are 13 Fellows in Tennessee, who are not affiliated with a state chapter.

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1. This brief does not necessarily reflect the views of any judge who is a member of the AAML. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this brief or reviewed it before its submission. The AAML does not represent a party in this matter, is receiving no compensation for acting as amicus, and has done so *pro bono publico*. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici, or their counsel, made a monetary contribution intended to fund its preparation or submission. The respondents have filed blanket waivers with the Court consenting to the submission of all amicus briefs. The Petitioners' consents are submitted herewith.

Membership qualifications for prospective Fellows are rigorous: each Fellow has demonstrated significant experience with complex family law cases and is recognized by the bench and his or her peers as a "preeminent family law practitioner with a high level of knowledge, skill and integrity." In states that do not have family law certification, including Michigan, the applicant must pass a written and oral examination.

The AAML was founded in 1962 to "provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law." The AAML sponsors continuing legal education courses for members and non-members, and has published handbooks and articles in support of marriage and parenting, including the *Model Parenting Plan*; *Making Marriage Last*; *The Voices of Children During Divorce: A Client Handbook*; and *Stepping Back from Anger: Protecting Your Children During Divorce*. The AAML participates as an amicus only if doing so would "encourage the study, improve the practice, elevate the standards and advance the course of matrimonial law, to the end that the welfare of the family and society be preserved."

In 2004, the AAML adopted a resolution and policy in support of same-sex marriage, and supporting "legislation authorizing marriage between same-sex couples who marry. . . and the extension of all legal rights and obligations of spouses and children to same-sex couples." The AAML adopted a resolution in 2012 in favor of the proposed Respect for Marriage Act of 2011 (S.598, 112th Cong. (2011) and H.R. 1116, 112th Cong.

(2011)) to repeal the Defense of Marriage Act,[2] to ensure respect for state regulation of marriage, and to eliminate the discriminatory effect of the Defense of Marriage Act.

The AAML has previously filed amicus briefs in support of marriage for same-sex couples in Maryland (*Conaway v. Deane*, 932 A.2d 571 (Md. 2007)), Missouri (*In Re the Marriage of M.S. v. D.S.*, No. SC94101 (pending) (Missouri 2015); Iowa (*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)), California (*In re Marriage Cases*, 183 P.3d 384 (Cal. 2008)), Virginia (*Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995)), and the Supreme Court of the United States (*Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013)).

The AAML has been granted consent by counsel for petitioners in each of the four cases to file its brief as Amicus Curiae in support of petitioners. A Notice of Consent has been or will be filed with the Court on behalf of AAML and other amici in support of petitioners.

SUMMARY OF ARGUMENT

In all of family law, the most universally accepted goal is to promote the best interests of children. Historically, the law recognizes that the best ways to achieve this end are for children to have permanent legal bonds with two parents, and to ensure continuity of care in a stable home environment. These concerns are inextricably bound to the institution of marriage. Marriage is not only a fundamental constitutional right, a joy, and a commitment: it is also one of the most powerful ways to secure for children the benefit of hundreds of laws intended to protect families.

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2. 1 U.S.C. § 7 (2012).

When a law actively undermines the very policies that it was designed to promote, it lacks a rational basis.[3] The state constitutional amendments and related statutes currently in effect in the states of the Sixth Circuit[4] (the "State DOMAs") purport to promote stability for children and the benefits of marriage for future generations. In fact, the State DOMAs undermine the very values they seek to protect. They stigmatize children of same-sex unions, foster unpredictable and inconsistent outcomes for families at critical times in their lives, and deny children of same-sex unions the continuity and financial protections that the law affords to children of legally recognized marriages.

This brief will discuss the ways that family law addresses these issues and how the same-sex marriage bans in the states of the Sixth Circuit undermine the interests of children.

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3. Petitioners argue that an elevated standard of review, rather than a "rational basis" test, should apply. Amici agree with this position but contend that even under a rational basis test, the State DOMAs fail.

4. Ky. Const. § 233A and Ky. Rev. Stat. Ann. §§ 402.005, 402.020, 402.040, and 402.045 (West, Westlaw through 2014 legislation); Mich. Const. art. 1, § 25 and Mich. Comp. Laws Ann. § 551.1 (West, Westlaw through 2014); Ohio Const. art. XV, § 11 and Ohio Rev. Code Ann. § 3101.01 (West, Westlaw through 2014); Tenn. Const. art. XI, Sec. 18 and Tenn. Code Ann. § 36-3-113 (West, Westlaw through end of the 2014 Second Reg. Sess.).

ARGUMENT

I. The State DOMA laws deny same-sex families the benefits of laws that enhance stability.

A. The State DOMA laws stigmatize children of same-sex unions and deny them the protection of legal recognition for both their parents.

Marriage is a valuable legal and social institution that provides an avenue for children to establish legal ties with their two parents. Social science research and jurisprudence both accept as fundamental truth that children are best off when they have secure and permanent bonds with both of their parents. *See In re Mark T.*, 154 N.W.2d 27, 38 (Mich. Ct. App. 1967); *Davis v. Flickinger*, 674 N.E.2d 1159 (Ohio 1997); Test. of David Brodzinsky, Feb. 2, 2014; Brodzinsky Expert Report, ECF No. 171-1. Not only are psychological bonds critical to a child's healthy development (*See Argument I(B), infra),* but legal bonds, too, are profoundly important. Having two parents whose status is legally recognized has major practical implications for a child. It provides two sources of enforceable financial support, thereby preserving public resources; creates lines of inheritance through two families; creates stability and predictability if one parent dies or the parents separate; and provides other practical advantages such as two parents to consent to medical treatment or participate in decisions relating to education and school activities.

One of the most effective means to secure recognition as a legal parent is through the institution of marriage. Marriage provides several avenues to legal parentage.

There is a longstanding presumption that a child born during a marriage is the legal child of both spouses.[5] Either parent in a legal marriage may pursue a step-parent adoption of the other's child.[6] In some states, if legally married, both parents together may adopt.[7] If a married couple pursues assisted reproduction with consent of the husband, their child is deemed the issue of the husband.[8] Any of these mechanisms affords the children of a legal marriage the benefit of two legal parents.

In the Sixth Circuit, the State DOMAs deny same-sex parents these avenues to legal recognition. If neither parent is biologically related to a child and both wish to adopt, under Michigan law, only one of the two partners may do so.[9] In other Sixth Circuit states, absent a legal

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5. *Michael H. v Gerald D.*, 109 S. Ct 2333, 2343 (1989). Mich. Comp. Laws Ann. § 552.29; Ohio Rev. Code Ann. § 3111.03 (a); Ky. Rev. Stat. Ann. § 406.011; *Evans v. Steelman*, 970 S.W.2d 431, 433 (Tenn. 1998).

6. Ky. Rev. Stat. Ann. §§ 199.500, 199.520 (West, Westlaw through 2014); Mich. Comp. Laws Ann. § 710.51 (West, Westlaw through 2014); Ohio Rev. Code Ann. § 3107.03 (West, Westlaw through 130th GA (2013-2014)); Tenn. Code Ann. § 36-1-115 (West, Westlaw through 2014 Second Reg. Sess.); *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky. Ct. App. 2008).

7. Ohio Rev. Code Ann. § 3107.03 (West, Westlaw through 130th GA (2013-2014)); Mich. Comp. Laws Ann. § 710.24 (West, Westlaw through 2014).

8. Ohio Rev. Code Ann. § 3111.95 (West, Westlaw through 130th GA (2013-2014)); Mich. Comp. Laws Ann. §333.2824(6) (West, Westlaw through 2014); Tenn. Code Ann. §68-3-306 (West, Westlaw through 2014 Second Reg. Sess.).

9. *In re Adams*, 473 N.W.2d 712 (Mich. Ct. App. 1991); 2004 Mich. Att'y Gen. Op. No. 7160 (Sept. 14, 2004).

marriage, a same-sex partner cannot file for a step-parent adoption.[10] Compared to opposite-sex couples, same-sex couples have fewer ways to secure a permanent legal bond with their children; and the children are the losers.

By barring same-sex parents from marrying, the State DOMAs burden children with the stigma of growing up in a family that the law refuses to acknowledge as "worthy of dignity in the community equal with all other marriages." *United States v. Windsor*, 133 S. Ct. 2675, 2692, 186 L. Ed. 2d 808 (2013). The State DOMAs send a message that in a same-sex union, the parent who lacks legal status is unworthy of respect under the law, and that the family unit itself does not deserve recognition. As this Court has put it, the unequal treatment of same-sex marriage "... humiliates tens of thousands of children now being raised by same-sex couples. ..." and "... makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *United States v. Windsor*, 133 S. Ct. 2675, 2694, 186 L. Ed. 2d 808 (2013).

B. The State DOMA laws deny legal protections for established parent-child relationships.

The most serious consequence to children when a same-sex union ends is the potential destruction of a parent-child relationship. Social science research overwhelmingly demonstrates the risk of long-term

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10. *S.J.L.S. v T.L.S.*, 265 S.W.3d (Ct. App. Ky. 2008); *In re Adoption of Doe*, 719 N.E.2d 107 (Oh. 1998); *In re Shelby L.B.* No. M2010-00879-COA-R9-PT, 2011 WL 1225567, Tenn. Ct. App 2011).

psychological damage to a child when the relationship with a parental figure is severed.[11] Children of same-sex unions are all too often exposed to this harm when a legally recognized parent (or a child's blood relatives, if the parent has died) contests custody and the other partner lacks recognition as a legal parent.

In family law cases, the state's paramount concern is the best interest of the child.[12] In defining that best interest, one of the most important factors is the continuity of the established custodial environment, where "over an appreciable period of time the child naturally looks to the custodian in such environment for guidance, discipline, the necessities of life and parental comfort." [13] So important is

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11. *See* Brodzinsky Expert Report, ECF 171-1, at 4934: ¶ 26(a). *See also* Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 Child Develop. 1025, 1037 (1992) (severing the parent-child bond between a child and a functional parent "can cause [the child] extreme distress").

12. Ky. Rev. Stat. Ann. § 403.270 (West, Westlaw through 2014); Mich. Comp. Laws Ann. §§ 722.23, 722.24 (West, Westlaw through 2014); Ohio Rev. Code Ann. §§ 3109.04, 3109.051(D) (West, Westlaw through 130th GA (2013-2014)); Tenn. Code Ann. §§ 36-6-106(a), 36-6-101(a)(2)(A)(i) (West, Westlaw through 2014 Second Reg. Sess.); *Burchell v. Burchell*, 684 S.W.2d 296 (Ky. App. 1984); *Harvey v. Harvey*, 680 N.W. 2d 835 (Mich. 2004); *In re Mark T.*, 154 N.W.2d 27 (Mich. Ct. App. 1967); *Birch v. Birch*, 463 N.E.2d 1254 (Ohio 1984); *Whitaker v. Whitaker*, 957 S.W.2d 834 (Tenn. Ct. App. 1997).

13. Mich. Comp. Laws Ann. §§ 722.27(1)(c), 722.23(d)-(e) (West, Westlaw through 2014); *see also* Ky. Rev. Stat. Ann. § 403.270(2) (West, Westlaw through end of the 2014 legislation); Ohio Rev. Code Ann. § 3109.051(A) (West, Westlaw through 2014); Tenn. Code Ann. § 36-6-106(a)(10) (West, Westlaw through end of

this concept of continuity that Michigan law, for example, requires clear and convincing evidence—the highest standard of civil proof[14]—to amend a court order if it would change a child's established custodial environment. *Id.*

With legal parents, an established relationship between parent and child is constitutionally protected. *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (discussing biological father's constitutionally protected interest in parent-child relationship). But the Sixth Circuit states do not extend this same respect for the parent-child bond to same-sex parents who lack legal parenthood.

In Kentucky and Ohio, same-sex partners may have standing to seek custody but even if they succeed in establishing the right to pursue custody, their rights are still subordinate to those of a fully recognized legal parent. *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010); *In re Mullen*, 953 N.E.2d 302 (Ohio 2011).[15] In some circumstances, a non-legal parent lacks standing to protect his or her relationship with the child, as exemplified in *State ex rel. M.L.G. v. Montgomery*, Nos. 12AP-13, 12AP-401 (Ohio Ct. App. Aug. 9, 2012), *appeal*

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the 2014 Second Reg. Sess.); *Vodvarka v. Grasmeyer*, 675 N.W.2d 847, 852-53 (Mich. Ct. App. 2003).

14. *Hunter v. Hunter*, 771 N.W.2d 694, 705-06 (Mich. 2009).

15. *See also In re D.C.J.* 976 N.E.2d 931 (Ohio Ct. App. 2012), *In re Perales*, 369 N.E.2d 1047 (Ohio 1977) (non-parent seeking custody must show that the legal parent is unsuitable or that the relationship with the legal parent is detrimental to the child). *See also* Ohio Rev. Code Ann. § 3109.051, 3111.03(A)(1) (West, Westlaw through 2014); Tenn. Code Ann. § 36-6-101(a)(2)(A)(i).

denied, 981 N.E.2d 885 (Ohio 2013), where a non-legal parent lacked standing to contest or even receive notice of her child's adoption by her former partner's new spouse.

In Michigan and Tennessee, the non-legal parent has even fewer rights than in Kentucky and Ohio. In these states, the non-legal parent must overcome major legal hurdles to protect the relationship with his/her child—even a child whom he/she has raised since birth. *See, e.g.*, *McGuffin v. Overton*, 542 N.W.2d 288, 289-92 (Mich. Ct. App. 1995) (same sex partner lacked standing to seek custody of children she had co-parented for years); *In re Anjoski*, 770 N.W.2d 1, 9 (Mich. Ct. App. 1991) (legal father's widow, with whom child lived, lacked standing to contest mother's custody after death of father); *In re Thompson*, 11 S.W.3d 913, 917-18 (Tenn. Ct. App. 1999) (same-sex partner who is not a legal parent lacks standing to seek visitation of child she co-parented). In Michigan, even where the non-legal parent can establish standing, the non-legal parent must prove by clear and convincing evidence that an award of custody to the legal parent is not in the child's best interests. Mich. Comp. Laws Ann. § 722.25(1) (West, Westlaw through 2014); *Hunter v. Hunter*, 771 N.W.2d 694, 705-06 (Mich. 2009); *Heltzel v. Heltzel*, 638 N.W.2d 123 (Mich. Ct. App. 2001). In Tennessee, a court must find that the biological parent is unfit. *Ray v. Ray*, 83 S.W.3d 726 (Tenn. Ct. App. 2001) (given the superior rights of natural parents over third parties, court cannot deny custody to biological parent unless he or she is found unfit); *Doles v. Doles*, 848 S.W.2d 656 (Tenn. Ct. App. 1992) (right of parent is superior in custody dispute between parent and third party).

In the absence of legally recognized parentage, courts are often precluded from protecting or even considering

children's need for continuity. Regardless of the best interests of the child, and regardless of the child's established custodial environment, courts often cannot protect the parent-child relationship because the non-legal parent either lacks standing to seek parental rights or is unable to meet the daunting evidentiary burdens imposed in such situations. The child in these circumstances is denied the right to remain with the adult who is that child's parent in every sense but legally.

C. The State DOMA laws deny legal protection to same-sex families when a partner dies.

When a spouse in an opposite-sex marriage dies, the surviving spouse and family enjoy numerous protections to maintain continuity and protect them economically. Because these benefits depend on a legal marriage, they are unavailable to families of same-sex couples who cannot marry. A surviving spouse has the rights:

- to inherit from a deceased spouse who dies without a will, Ky. Rev. Stat. Ann. § 391.030 (West, Westlaw through 2014 legislation); Mich. Comp. Laws Ann. § 700.2102 (West, Westlaw through 2014); Ohio Rev. Code Ann. § 2105.06 (West, Westlaw through 130th GA (2013-2014)); Tenn. Code Ann. § 31-2-104 (West, Westlaw through 2014 Second Reg. Sess.)

- to elect against a spouse's will and receive a legally guaranteed share of the estate, Ky. Rev. Stat. Ann. § 392.080 (West, Westlaw through 2014 legislation); Mich Comp. Laws §§ 700.2202, 700.2301 (West, Westlaw through 2014); Ohio Rev. Code Ann. § 2106.01 (West, Westlaw through 130th GA (2013-

2014)); Tenn. Code Ann. § 31-4-101 (West, Westlaw through end of the 2014 Second Reg. Sess.)

- to remain in the family home and receive an allowance from the estate, free of creditors' claims, while the estate is being settled, Ky. Rev. Stat. Ann. § 391.030 (West, Westlaw through 2014 legislation); Mich. Comp. Laws Ann. §§ 700.2402-2404 (West, Westlaw through 2014); Ohio Rev. Code Ann. § 2106.15 (West, Westlaw through 130th GA (2013-2014)); Tenn. Code Ann. § 30-2-102 (West, Westlaw through end of the 2014 Second Reg. Sess.)

- to receive death benefits under Workers' Compensation law, Ky. Rev. Stat. Ann. § 342.750 (West, Westlaw through the end of the 2014 legislation); Mich. Comp. Laws Ann. § 418.331 (West, Westlaw through 2014); Ohio Rev. Code Ann. § 4123.59 (West, Westlaw through the 130th GA (2013-2014)); Tenn. Code Ann. § 50-6-303 (West, Westlaw through end of the 2014 Second Reg. Sess.)

- to receive Social Security death benefits, 42 U.S.C. § 1395i-2 (2012) (lump sum death benefit); 42 U.S.C. § 402(g), (d) (2012) (parent benefits)

- to receive Veteran's benefits, 38 U.S.C. §§ 1311, 1317 (spousal death benefits), 1158 (disappearance benefits) (2012); Ky. Rev. Stat. Ann. § 18A.150 (2), (3) (West, Westlaw through 2014) (spousal preference in employment); Ohio Rev. Code Ann. § 5901.08 (West, Westlaw through the 130th GA (2013-2014) (financial assistance to spouse); Tenn. Code Ann. § 8-30-307 (West, Westlaw through end of the

2014 Second Reg. Sess.) (spousal preference in employment)

- to receive retirement survivor benefits, 29 U.S.C. § 1055 (2012) (ERISA qualified plans); Mich. Comp. Laws Ann. § 38.1024(1), (8) (West, Westlaw through 2014) (Michigan state civil services); Ohio Rev. Code Ann. § 145.45, 92 (West, Westlaw through the 130th GA (2013-2014)); Tenn. Code Ann. § 8-36-109 (West, Westlaw through the end of the 2014 Second Reg. Session)

- to file a wrongful death claim, Ky. Rev. Stat. Ann. § 411.130 (West, Westlaw through 2014); Mich. Comp. Laws Ann. § 600.2922(2)(a) (West, Westlaw through 2014); Ohio Rev. Code Ann. § 2125.02 (West, Westlaw through the 130th GA (2013-2014)); Tenn. Code Ann. § 20-5-106 (West, Westlaw through end of the 2014 Second Reg. Sess.); and

- to inherit an unlimited estate from a spouse free of Federal and State inheritance taxes, 26 U.S.C. § 2056 (2012); Ky. Rev. Stat. Ann. § 140.080 (West, Westlaw through 2014); Mich. Comp. Laws Ann. § 205.202 (West, Westlaw through 2014); Ohio Rev. Code Ann. § 5731.05(C)(4)(West, Westlaw through the 130th GA (2013-2014)); Tenn. Code Ann. § 67-8-305 (West, Westlaw through 2014 Second Reg. Sess.) (For transfers between spouses, only one half of the value of the account or property is considered a taxable transfer).

These benefits leave families of legally married couples more financially secure, when one spouse dies, than families of same-sex couples who cannot marry.

In addition to these economic protections, a legal spouse may make medical decisions for a spouse, including decisions about organ donation and, in some states, other medical matters;[16] make burial arrangements;[17] or consent to a post-mortem exam.[18] A legal spouse may recover benefits when a spouse is the victim of a crime.[19] All of these rights provide financial security and comfort, and preserve some semblance of dignity and order at a time when the family most needs it. Same-sex couples and their

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16. Ky. Rev. Stat. Ann. § 311.1925 (West, Westlaw through 2014) (posthumous organ donation); Ohio Rev. Code Ann. § 2108.09 (West, Westlaw through the 130th GA (2013-2014)) (posthumous organ donation); Tenn. Code Ann. § 68-30-109(b)(3) (West, Westlaw through 2014 Second Reg. Sess.) (posthumous organ donation); *Whaley v. Cnty. of Saginaw*, 941 F. Supp. 1483, 1491 (E.D. Mich. 1996)

17. Ky. Rev. Stat. Ann. § 367.97501 (West, Westlaw through the end of the 2014 legislation); Mich. Comp. Laws Ann. § 700.3206 (West, Westlaw through 2014); Ohio Rev. Code Ann. § 2108.81 (West, Westlaw through the 130th GA (2013-2014)); *Estes v. Woodlawn Memorial Park, Inc.*, 780 S.W.2d 759 (Tenn. Ct. App. 1989).

18. Ky. Rev. Stat. Ann. § 72.425 (West, Westlaw through 2014); Mich. Comp. Laws Ann. § 333.2855 (West, Westlaw through 2014); Ohio Rev. Code Ann. §§ 2108.50(A), 2108.81 (West, Westlaw through the 130th GA (2013-2014)); Tenn. Code Ann. § 68-4-111(a) (West, Westlaw through end of the 2014 Second Reg. Sess.).

19. Ky. Rev. Stat. Ann. § 346.050(1)(b) (West, Westlaw through the end of the 2014 legislation); Mich. Comp. Laws Ann. § 780.766(4)(h) (West, Westlaw through 2014); Ohio Rev. Code Ann. § 2743.51 (West, Westlaw through the 130th GA (2013-2014)) (dependent of victim is claimant for victim's benefits); Tenn. Code Ann. § 29-13-105 (West, Westlaw through end of the 2014 Second Reg. Sess.).

children enjoy none of these protections under the current law. After the death of a same-sex partner, the survivor may find him/herself homeless, financially cut off, and locked in conflict with third parties over parenting time or custody. The children suffer the consequences.

D. The State DOMA laws deny same-sex couples the benefit of laws that protect families when couples separate.

When legally married couples end their relationship, the divorce process is governed by a well-established body of law concerning property division, spousal support, custody, parenting time, and child support. This comprehensive legal framework provides predictability and promotes stability. Parties have access to court guidance to assure an equitable division of property and income,[20] and to protect the best interests of the

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20. Ky. Rev. Stat. Ann. § 403.190 (West, Westlaw through the end of the 2014 legislation) (division of property); Ky. Rev. Stat. Ann. § 403.200 (West, Westlaw through the end of the 2014 legislation) (spousal support); Mich. Comp. Laws Ann. § 557.204 (West, Westlaw through 2014) (equal rights to property); Mich. Comp. Laws Ann. §§ 552.19, 552.23, 552.103 (West, Westlaw through 2014) (property division); Mich. Comp. Laws Ann. §§ 722.27(a), 552.23, 552.601 (West, Westlaw through 2014) (spousal support); Mich. Comp. Laws Ann. § 552.18 (West, Westlaw through 2014) (pension benefits); Ohio Rev. Code Ann. § 3105.171 (West, Westlaw through the 130th GA (2013-2014)) (division of property); Ohio Rev. Code Ann. § 3105.18 (West, Westlaw through the 130th GA (2013-2014)) (spousal support); Ohio Rev. Code Ann. § 3105.821 (West, Westlaw through the 130th GA (2013-2014)) (public retirement benefits); Tenn. Code Ann. § 36-4-121 (West, Westlaw through end of the 2014 Second Reg. Sess.) (division of property).

children.[21] A divorcing spouse has a right to share in property accumulated during the marriage even if it is titled in the other spouse's name.[22] Divorcing spouses can divide property, including retirement benefits, without tax consequence. [23]

Same-sex couples do not enjoy the protections of this legal framework when their relationships end. A same-sex partner does not have the right to alimony and has no right to share in the other partner's retirement benefits or other lifelong accumulation of property, even if he/she was a dependent homemaker who stayed home to raise the children and bolster the other partner's career. If, despite the absence of any law compelling a property division, separating same-sex partners can agree to divide property, the transfers are not exempt from taxation.

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21. Ky. Rev. Stat. Ann. § 403.213 (West, Westlaw through the end of the 2014 legislation)(child support); Ky. Rev. Stat. Ann. §§ 403.270, 403.280, 403.290, 403.300 (West, Westlaw through the end of the 2014 legislation); Mich. Comp. Laws Ann. § 722.27 (West, Westlaw through 2014) (parenting time and child support); Mich. Comp. Laws Ann. § 552.23 (West, Westlaw through 2014) (support); Mich. Comp. Laws Ann. § 722.2(c) (West, Westlaw through 2014) (parents' right to custody); Ohio Rev. Code Ann. § 3105.21, 3119.01 (West, Westlaw through the 130th GA (2013-2014)) (child support); Tenn. Code Ann. § 36-6-101 (West, Westlaw through end of the 2914 Second Reg. Sess.)(custody and support). Child custody and child support statutes also govern unmarried couples who are legally recognized as parents; but as noted in Sections I(A) and (B) above, for many same-sex parents, the rights and obligations of legal parentage are unavailable without the ability to marry.

22. See Note 20, supra.

23. 26 U.S.C. § 1041 (2012); Retirement Equity Act of 1984, 26 U.S.C. § 414(p) (2012); 29 U.S.C. § 1056(d)(3) (2012).

Instead of predictability, same-sex partners and their children are left mired in uncertainty and expense.

Even when separated, legally recognized parents have a duty to support their children.[24] State and Federal law provide powerful mechanisms to enforce these support obligations.[25] But since the support obligation is tied to legal parentage, and the State DOMAs render marriage unavailable to same-sex partners as a means to achieve this legal recognition, this often leaves children of same-sex unions without a right to support from both parents. If the non-legal parent is the breadwinner, this can be financially devastating for the children.

Without the legal framework that governs dissolution of marriages, when same-sex couples separate, they are forced into an unpredictable and often chaotic transition that denies them, and their children, the consistency, stability and financial security that family law is intended to promote.

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24. Ky. Rev. Stat. Ann. § 403.210 (West, Westlaw through 2014); Mich. Comp. Laws Ann. § 552.17a (West, Westlaw through 2014); Ohio Rev. Code Ann § 3109.03, 3109.05 (West, Westlaw through 2013-2014); Tenn. Code Ann. § 36-5-101 (West, Westlaw through 2014).

25. *See, e.g.*, Ky. Rev. Stat Ann. §§ 403.211, 403.215 (West, Westlaw through 2014); Mich. Comp. Laws Ann. §§ 552.603, 552.27 (West, Westlaw through 2014); Ohio Rev. Code Ann §§ 2705.02, 2705.03, 3123.01 to 99 (West, Westlaw through 2013-2014); Tenn. Code Ann. § 36-5-701 to 713, 36-5-801 to 816, 36-5-901 to 912 (West, Westlaw through 2014); 42 U.S.C. § 660 (2012).

II. Even in intact same-sex households, the State DOMA laws deny legal protections for family financial security.

The harm to families caused by the State DOMAs is not limited to times of crisis such as the death of a partner or the end of a couple's relationship. Even in the conduct of their daily activities and financial affairs, same-sex couples and their children are denied hundreds of legal protections that are available to legally married families. These protections contribute to the security of families, but without the right to marry, same-sex parents and their children lose out.

In overturning part of the Defense of Marriage Act, 1 U.S.C. § 7 (2012), this Court recognized the harm that flows to same-sex couples and their children from denial of such benefits:

> It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive . . . . It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. . . . It forces them to follow a complicated procedure to file their state and federal taxes jointly. . . . It prohibits them from being buried together in veterans' cemeteries. . . . It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. . . . And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.

United States v. Windsor, 133 S. Ct. 2675, 2694-95 (2013) (citations omitted).

Among the mainstays of this nation's social safety net are the health, retirement and other protections provided by Social Security, Medicare, Medicaid, and the Veterans Administration. Federal and state tax codes contain numerous provisions that benefit families. In many cases, such benefits are available to legally married spouses but not to same-sex couples who cannot marry. For example,

- *Social Security Retirement Benefits*: A lower earning spouse may claim retirement or disability benefits equal to half the higher-earning spouse's entitlement, and may qualify for Medicare based on the other spouse's work record. 42 U.S.C. §§ 402 (b), 402(c), 426-1, 1395i-2 (2012). A surviving spouse may under many circumstances collect a deceased spouse's higher retirement benefit. 42 U.S.C. § 402 (e), (f) (2012). These benefits are critical for dependent spouses who may not have accrued sufficient work credits of their own. Without the ability to share benefits earned by a higher-paid partner, same-sex couples are less free than married spouses to divide family responsibilities between breadwinner and homemaker; they must either divert resources during their child-rearing years to provide for their retirement or depend on their children for support in their old age. Either way, the children suffer a lifelong disadvantage.

- *Income Taxes:* Same-sex partners who cannot legally marry must file separate state and Federal income tax returns. Rev. Rul. 2013-17, 2013-38

I.R.B. 201; *see, e.g.*, Ky. Rev. Stat. Ann. § 141.180 (West, Westlaw through 2014); Mich. Comp. Laws Ann. § 206.311 (West, Westlaw through 2014); Ohio Rev. Code Sec. 5747.08(E). This creates needless complication and expense for couples who may have otherwise merged their finances, and it may sometimes create an added tax burden.

- *Veterans' Benefits:* Disabled veterans are entitled to increased compensation if they have a spouse. 38 U.S.C. § 1115 (2012). Veterans' spouses may receive education assistance, 38 U.S.C. § 3501 (2012); job counseling and placement services, 38 U.S.C. § 4101 (2012); and medical care, 38 U.S.C. § 1781 (2012). Same-sex partners of veterans who cannot marry receive none of these benefits.

- *Taxation of Benefits:* Even when they do receive health care benefits, same-sex couples pay more than married couples because they are not afforded the same favorable treatment under Federal tax laws. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

- *Spousal Protections from Medicaid Spend-Down Requirements for Long- Term Care*: When one spouse requires government assistance for long-term care, the other spouse is entitled to various safeguards that protect the family home and preserve other resources that would otherwise have to be "spent down" to qualify for assistance. 42 U.S.C. §§ 1396p(c)(2), 1396p(a)(2), 1396r-5(f)(2)(A), 1396r-5(d)(3) (2012). Same-sex partners, without these protections, may face insolvency when a partner needs long-term care.

Federal programs and favorable tax treatment are not the only benefits denied to same-sex couples. Same-sex couples who cannot marry are denied other economic advantages as well:

- *Public Employee Benefits:* Michigan's State DOMA denied same-sex public employees access to employment benefits that were routinely offered to legally married couples. *National Pride at Work v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008) (holding that public employers may not offer healthcare benefits to same-sex partners).[26] *See also* Ohio Rev. Code Ann. §§145.45, 145.384 (West, Westlaw through 130th GA (2013-2014) (spousal retirement benefits and spousal consent requirements).

- *Entireties Property:* In a number of states, married spouses have the right to hold property by the entireties, *Tkachik v. Mandeville*, 790 N.W.2d 260, 265 (Mich. 2010); are entitled to share equally in the control and income from that property, Mich. Comp. Laws Ann. § 557.71 (West, Westlaw through 2014); and enjoy protections from creditors that are not available to unmarried joint tenants, *Estes v. Titus*, 751 N.W.2d 493 (Mich. 2008). *See also* Ky. Rev. Stat. Ann. § 381.050(2) (West, Westlaw through 2014); Tenn. Code Ann. § 66-1-109 (West, Westlaw

26. Ultimately, the state health plan was amended to solve this problem. *See Attorney General v. Civil Service Commission* (unpublished), 2013 WL 85805 (Ct. App. Mich. 2013) (subsequent amendments to State Health Plan permitted coverage.) *See also Bassett v Snyder*, ___F.Supp. 3d___, 2014 WL 5847607 (E.D.Mich, Nov. 12, 2014).

through 2014).[27] Same-sex couples do not have these protections.

These are but a few examples of the hundreds of ways in which a ban on same-sex marriage visits tangible and significant economic harm on families. The Government Accounting Office has identified 1,138 Federal benefits that flow to legally recognized spouses, and that are unavailable to same-sex partners who cannot legally marry. *Perry v. Schwartzenegger*, 704 F. Supp. 2d 921, 962 (N.D. Cal. 2010); *see* Letter from Dayna K. Shah, Assoc. Gen. Counsel, General Accounting Office, to Hon. Bill Frist, Senate Majority Leader, at 1 (No. GAO-04-353R Jan. 23, 2004). When a family is economically deprived, children suffer.

Some same-sex couples attempt to reduce the harsh impact of the state DOMAs by drafting protective legal documents. Health care proxies, powers of attorney, wills, trusts, beneficiary designations and guardianship appointments can approximate some of the protections that the law grants automatically to families of legally married couples. But these measures are expensive, and their protections are incomplete. *See McGuffin v. Overton*, 214 Mich. App. 95, 542 N.W.2d 288 (1995) (same-sex partner lacked standing to challenge custody of legal father despite having a power of attorney and a will naming her as guardian). Institutions may or may not honor a power of attorney. A health care power of attorney or medical release may not be readily at hand during an emergency where a partner is called upon to make a life or death decision. In Michigan, one partner's Will may name the

27. Ohio does not recognize tenancies by the entirety.

other parent as guardian of their children, but if the legal parent dies, the surviving parent may have to undergo close scrutiny in an often lengthy, expensive and intrusive court proceeding before being recognized as guardian; must submit to annual reviews; and any interested person may seek to remove that parent as guardian at any time. Mich. Comp. Laws Ann. §§700.5207(1), 700.5209, 700.5219 (West, Westlaw through 2014). Compare this to a legally married couple, where if the surviving spouse is a legal parent, his/her parental rights continue automatically and are very difficult to challenge. Further, for many of the most important spousal rights such as tax and social security benefits, there is no available workaround.

For same-sex couples whose daily concerns are no different from any other couples—making a living, making a home for their families, raising their children—these complicated and expensive legal stop-gaps are no substitute for the comprehensive system of protections that the law guarantees, automatically and without sophisticated planning and legal paperwork, to families of legal marriages.

The State DOMAs disadvantage children of same-sex couples, compromising their financial security and relegating them to a lesser status, based purely on the circumstances of their birth. This Court has recognized for decades that children should not be punished simply because society disapproves of their parents' relations:

> But visiting this condemnation on the head of an infant is illogical and unjust. . . . Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well

> as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 171, 175-76 (1972); *see also Levy v. Louisiana*, 391 U.S. 68 (1968). Yet the State DOMAs deprive children of same-sex parents protections that are available to opposite-sex families solely because of their parentage. They punish the children of these families and rob them of security simply because they happen to have been born to parents who, because of the State DOMAs, do not have the right to marry.

CONCLUSION

Contrary to any intent to promote the welfare of children and stability of families, the State DOMAs harm same-sex couples and their children by denying them the rights, benefits and protections enjoyed by families of legally married opposite-sex couples. These laws deny children of same-sex partners the dignity, predictability, continuity, and financial support to which they would be entitled if their parents were allowed to marry. If same-sex parents are able to marry, they can access the avenues to legal parentage that marriage makes possible; and all of the benefits that children derive from having two legal parents—support from two parents, established lines of inheritance, economic protections, and awards of custody

according to the same best-interest standards that apply to all legal parents—will become more readily available to these families. There is no constitutionally justifiable reason to deny these protections to same-sex couples in Michigan, Kentucky, Ohio and Tennessee, and to their children.

Based on the above arguments and those of the opponents of the State DOMAs, the Amicus urges this Court to reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully Submitted,

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